(9)

No. 96-1866

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1997

ALIDA STAR GEBSER AND
ALIDA JEAN MCCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, the American Insurance Association ("AIA"), is a national trade association representing more than 300 major companies writing property and casualty insurance policies throughout the United States. Its members constitute more than 48% of the market share for multi-peril coverage throughout the United States.

AIA regularly files *amicus curiae* briefs in cases that will have a significant impact on its members. In this case, AIA and its members have a vital interest in maintaining school environments that are free from sexual harassment. At the same time, *amicus* and its members also have a substantial interest in clarifying the Title IX standard of liability. An appropriate standard would avoid needless litigation, and at the same time would ensure that liability is not extended beyond the point necessary to provide effective incentives to address the serious issue of sexual harassment.

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681-1688, provides a private right of action for claims of gender discrimination, including sexual harassment. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Courts are split, however, concerning the standard under

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[1]No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amicus* and its counsel made any monetary contribution to its preparation or submission. Both parties consent to the filing of this brief.

which education programs and activities are liable in these individual actions. In several cases, including a prior opinion of the court below, Title IX was construed to provide monetary remedies only for claims of intentional discrimination, limited to situations in which an education program had actual knowledge of alleged harassment. Other courts, however, have held that Title IX should import employer liability standards directly from Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-1 *et seq*.

Title IX, *amicus* submits, reveals a far narrower legislative purpose than Title VII. It does not broadly prohibit all sex discrimination in education programs or even demand that any particular education program cease discriminating; it merely requires education programs accepting federal funds to make a promise concerning gender discrimination. The "contractual" nature of this promise, apparent not only from the statutory text but also from the legislative history, typifies enactments under Congress' Spending Clause power. It would make little sense to hold a program liable for breaching its contractual obligation when the individuals statutorily responsible for making the commitment -- officials in charge of the program's "operations" -- were unaware of the alleged breach. Nor does this Court's Spending Clause precedent permit such a counterintuitive result.

All Spending Clause cases must start from the presumption, recognized in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), that monetary remedies are unavailable except as unambiguously indicated by Congress. In the Title IX context, the Court has been willing to override this presumption only when the claim involves "intentional

discrimination." *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992). The Court had no choice but to analyze *Franklin* as an intent case because facts indicating knowing discrimination were alleged in the complaint, assumed as true by the trial court in granting a motion to dismiss, and posited as understood in the question accepted on *certiorari*. A finding of intent by operation of law, by contrast, would effectively nullify the *Pennhurst* presumption by making every harassment case actionable, regardless of the knowledge, conduct, or actual intent of the school's administrators.

Phrasing differences between the anti-discrimination provisions of Title VII and Title IX do not evidence a broader intent, because the text of Title IX specifically defines and limits the "education program" responsible for the contractual commitment not to discriminate. Nor are belatedly issued administrative guidelines from the Department of Education controlling in light of their ambiguity, inconsistency with prior agency pronouncements, and conflicts with existing case law and demonstrable congressional intent. This Court, therefore, should affirm the holding of the court below.

ARGUMENT

I. TITLE IX, AS A SPENDING CLAUSE ENACTMENT, PRECLUDES DAMAGES FOR ALLEGED DISCRIMINATION WHEN INTENT, ABSENT IN REALITY, CAN BE INFERRED SOLELY BY OPERATION OF LAW

In 1979, this Court authorized private lawsuits under Title IX, which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see Cannon v. University of Chicago*, 441 U.S. 677 (1979). Thirteen years later, the Court held that monetary relief may be available in Title IX private actions. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Significant disagreements have developed, however, concerning the standard for determining damage liability. Several courts have held that Title IX should incorporate, essentially without exception, the rules governing employer liability under Title VII. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899-900 (1st Cir. 1988); *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Brzonkala v. Virginia Polytechnic Institute & State University*, Nos. 96-1814, 96-2316, slip op., at *6 (4th Cir. Dec. 23, 1997) (1997 WL 785529) (to be reported at 132 F.3d 949); *Doe v. Claiborne County*, 103 F.3d 495, 514-15

(6th Cir. 1996); *Kinman v. Omaha Public School District*, 94 F.3d 463, 469 (8th Cir. 1996).[2]

On the other hand, three circuit court decisions, including a prior opinion of the court below, distinguish Title IX from Title VII because the former statute was enacted pursuant to Congress' authority under the Spending Clause of the Constitution, Art. 1, § 8, cl. 1. Based on relevant Supreme Court precedent, these courts have held that Title IX cannot support liability unless the education program breached its commitment not to discriminate with actual notice of the alleged misconduct. *See Rosa H. v. San Elizario Independent School District*, 106 F.3d 648, 652-53 (5th Cir. 1997); *Smith v. Metropolitan School District of Perry Township*, 128 F.3d 1014, 1034 (7th Cir. 1997); *Floyd v. Waiters*, No. 94-8667, slip op., at *4 (11th Cir. Jan. 20, 1998) (1998 WL 17093).

Amicus believes that a Spending Clause analysis accurately reflects not only the proper source of congressional authority, but also the narrower purpose

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[2]Although these courts agree (wrongly) that Title IX should apply principles from Title VII, they do not concur on the proper standard to borrow. The courts in *Lipsett*, *Brzonkala*, *Doe*, and *Kinman* would find liability under Title IX only if an education program's administrators knew or should have known of the harassment but failed to respond -- a test that would absolve Respondent from liability if applied to the trial court's findings in this case. *See infra* note 6. The court in *Kracunas*, on the other hand, would apply a more stringent standard approaching strict liability. This uncertainty will be resolved when the Court considers the corresponding Title VII standard this Term in *Faragher v. City of Boca Raton*, 118 S. Ct. 438 (No. 97-282), *granting cert. to* 111 F.3d 1530 (11th Cir. 1997).

that Congress envisioned when it enacted Title IX.[3] Properly applied, such an analysis inescapably leads to affirmance of the court below.

A. Title IX, Enacted Pursuant to Congress' Spending Clause Powers, Is Far Narrower Than Title VII In Sweep And Purpose

Title IX certainly expresses a strong congressional policy against sex discrimination. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982) (stating that courts should accord Title IX "a sweep as broad as its language"). Even stronger language has been used to describe the legislative purpose of Title VII. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) ("Title VII is a broad remedial

[3]Many courts have reflexively imported Title VII principles into Title IX without thorough analysis or any consideration of differences between the two statutes. Several courts, for example, have accepted Title VII as a guidepost for Title IX merely because both statutes regulate the general subject of sex discrimination. *See, e.g., Lipsett*, 864 F.2d at 896 ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, . . . [it is] the most appropriate analogue when defining Title IX's substantive standards."). Others have attached undue significance to this Court's citation, in *Franklin*, of a single Title VII case. *See, e.g., Brzonkala*, slip op., at *5 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), as cited in *Franklin*, 503 U.S. at 75). The quote in question stood only for the unremarkable proposition that sexual harassment constitutes gender discrimination, conceded by the defendant in *Meritor*. *See* 477 U.S. at 64. The Court's statement in *Franklin* that "the same rule should apply when a teacher sexually harasses a student," therefore, does not establish that other vigorously contested doctrines, including *respondeat superior*, see *id.* at 70, have also been approved.

measure, designed 'to assure equality of employment opportunities.'") (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (Title VII demands "[u]nrelenting broad-scale action against patterns or practices of discrimination") (quoting H.R. Rep. No. 92-238, 92d Cong., 1st Sess., at 14 (1971)).

What truly separates Title IX from Title VII, however, is the many ways in which Title IX falls short of Title VII's "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Landgraf v. USI Film Products*, 511 U.S. 244, 254 (1994) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)). To begin with, Title IX does not apply to all educational institutions "throughout the economy"; it only regulates "education programs and activities receiving Federal financial assistance." 20 U.S.C. § 1681(a). Congress' primary interest in regulating such programs, moreover, is not "making persons whole for injuries suffered through past discrimination," but ensuring that federal funds are not used to support discriminatory practices. *See Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 595 (1983) (White, J.) ("make whole" remedy not provided under Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d-1 *et seq.*, the race, color, and national origin counterpart of Title IX).[4]

[4]The Court in *Cannon* also found that Congress sought, through Title IX, to "provide individual citizens effective protection against [discriminatory] practices." 441 U.S. at

[Footnote continued on next page]

Thus, rather than broadly decreeing that specified practices will be illegal, as a Commerce Clause, Fourteenth Amendment, or similar enactment might do, Title IX gives educational institutions or systems an option to continue discriminatory practices if they wish. The *only* stipulation imposed by Title IX is that programs choosing to accept federal funds must make a commitment not to discriminate based on sex. *See* 118 Cong. Rec. 5806-07 (1972) (statement of Rep. Mink) ("Any college or university which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination.")

[Footnote continued from previous page]

704. The purpose of individual relief, however, was not to provide make-whole remedies for their own sake, but rather to ensure "orderly enforcement of the statute," *id.* at 706, by "protect[ing] the individual from some power complex." *Id.* at 704 n.36 (quoting 110 Cong. Rec. 7062 (1964) (statement of Rep. Lindsay)). It is far from clear, moreover, that the congressional debate cited in support of this proposition relates at all to Title VI, whose legislative history the Court found relevant because of its similarity to Title IX. Passages immediately preceding and following Rep. Lindsay's remarks describe other specific provisions of the Civil Rights Act of 1964, also in the proposal under debate, which not only are entirely distinct from Title VI but also incorporate explicit individual remedies. *See* 110 Cong. Rec. 1540 (describing the bill before Congress as prohibiting discrimination "because of race or religion," an apparent reference to Title VII, which encompasses religion, and not Title VI, which does not); *id.* (describing "injunctive processes that are provided in this bill," which are absent from Title VI but are explicitly made available to private plaintiffs in Title VII, 42 U.S.C. § 2000e-5(g)); *id.* at 1541 (describing Title II, pertaining to public accommodations).

(quoted in *Cannon v. University of Chicago*, 441 U.S. 677, 703 n.36 (1979)).

Education programs that accept government assistance thus make "contracts" under Title IX not to engage in gender discrimination. *Floyd v. Waiters*, No. 94-8667, slip op., at *4 (11th Cir. Jan. 20, 1998) (1998 WL 17093). This very contractual nature is what defines enactments pursuant to the Spending Clause of the Constitution, Art. 1, § 8, cl. 1. *See Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."). There can be little doubt, in light of this structure, that Title IX is properly classified as an exercise of Congress' Spending Clause power. *See Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 599 (1983) (White, J.) (Title VI is "a typical 'contractual' spending power provision"); *Cannon*, 441 U.S. at 684-85, 690 (noting that Title IX "was patterned after Title VI," and relying in part on the "remarkably similar" dispositive language of those provisions to justify a private right of action under Title IX).

B. Sweeping Remedies For Acts Entirely Unknown To The Entities That Made Contractual Commitments Upon Receiving Federal Funds Are Inappropriate Under The Spending Clause

In addition to stipulating that every recipient of federal education funding must enter into a contract not to discriminate, Title IX explicitly defines the obligor for that contract as the "education program or activity"

receiving federal funds. 20 U.S.C. § 1681(a). The identity of this obligor is further explicated in Title IX's definition of "program or activity," which refers directly to the "operations" of the institution or system receiving such funds. *Id.* § 1687.[5] This provision clearly suggests that Congress wanted a commitment from officials who have the power, on behalf of all an education program's operations, to address discrimination. Such officials include members of the boards and individual administrators who run the "operations" of an institution or school system. *See Smith*, 128 F.3d at 1024 ("local education agency," the particular type of program at issue in that case -- and this one -- consists only of administrative boards and personnel, citing 20 U.S.C. § 8801, cross-referenced in section 1687). They do not encompass teachers or other subordinates. *Id.*

Thus, the text and legislative history of Title IX support liability under the Spending Clause only if an education program's administrators have breached their commitment to address discrimination. It is reasonable

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[5]Section 1687 was added to Title IX in 1988 in response to *Grove City College v. Bell*, 465 U.S. 555 (1984), which Congress believed had interpreted the term "education program or activity" too narrowly. Pub. L. No. 100-259, 100th Cong., 2d Sess. (1988). Congress' concern, however, was that Title IX should be interpreted to forbid gender discrimination "institution-wide" rather than only in the particular department that received federal money. S. Rep. No. 64, 100th Cong., 2d Sess. (1987), *reprinted at* 1988 U.S.C.C.A.N. 3. The legislative history of section 1687, however, does not suggest that Congress was interested in regulating anything other than the institution-wide group of "operations" associated with a program and the individuals and boards who administer them.

to conclude that this commitment has been breached if these individuals intentionally discriminated, either directly or through a conscious decision not to intervene after harassment was brought to their attention. It is not reasonable to conclude that these individuals breached their commitment if they never knew of the incident in question.

This same result is compelled by this Court's own consideration of Spending Clause enactments. In *Pennhurst*, this Court held that monetary remedies are presumptively precluded under the Spending Clause unless the statutory text or legislative history unambiguously suggest otherwise. 451 U.S. at 17-18. This unambiguous evidence was absent in *Pennhurst*, which involved an alleged failure to live up to vague commitments concerning the treatment of mentally retarded patients.

The requisite indication of congressional purpose was similarly found lacking for disparate impact claims under Title VI, whose legislative history the Court found so instructive in *Cannon*. Beginning from the proposition that Title VI is "a typical 'contractual' spending power provision," *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 600 (1983) (White, J.), Justice White's opinion for a divided Court concluded that there was no "persuasive evidence of contrary legislative intent" to provide a remedy. *Id.* at 599 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979)). The minimal legislative history that was available, in fact, "'weigh[ed] against the implication of a private right of action for a monetary award in a case such as this,' at least absent proof of intentional discrimination." *Id.* at 600 (citation omitted) (quoting *Transamerica*, 444 U.S. at 20).

This opinion, and the Court's later dictum in *Franklin* that monetary damages should be denied under the Spending Clause "when the alleged violation was unintentional" but not when "intentional discrimination is alleged," 503 U.S. at 74-75 (emphasis added), explain why the court below was fully justified in disallowing broader Spending Clause recoveries. It simply is not enough to say, like the United States as *amicus curiae*, that the far-reaching tort law doctrine of *respondeat superior* existed when Title IX was passed, and should have put education programs on notice that they would be subject to strict liability. Brief for the United States as *Amicus Curiae* ("U.S. Br.") at 27. The *respondeat superior* doctrine has not even gained general acceptance in the broader context of Title VII, as demonstrated by the Court's recent grant of *certiorari* in *Faragher v. City of Boca Raton*, 118 S. Ct. 438 (No. 97-282), *granting cert. to* 111 F.3d 1530 (11th Cir. 1997). Thus, there is an utter lack of any evidence -- much less the unambiguous, "persuasive" evidence necessary to overcome the *Pennhurst* presumption -- establishing that Congress wanted to apply such sweeping doctrines to the far narrower and more specific provisions of Title IX.

Nor can *Franklin* be read to circumvent the force of the Court's carefully drawn distinction between intentional and unintentional conduct by automatically deeming every teacher harassment claim to be an intentional act of the school system. The discussion in *Franklin* does not reflect the Court's own finding that intentional discrimination occurred; it merely acknowledges, in response to arguments submitted by the parties and *amici*, that intentional discrimination was "alleged." 503 U.S. at 75. The court had little choice but to do so, since the questions it agreed to

review had *assumed* "intentional discrimination." *See* Petition for Writ of Certiorari, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), at i. The basis of the intent allegation in *Franklin*, moreover, was not *respondeat superior*, but specific accusations of knowing misconduct by school officials. *See* Brief *Amici Curiae* of the National Women's Law Center, *et al.*, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (characterizing the violation in *Franklin* as "intentional" because the "school district . . . knowingly tolerated repeated sexual assaults against [the plaintiff]"). The lower court accepted these allegations as true for purposes of its order dismissing the complaint. *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 619 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992).

The Court's Spending Clause precedent, therefore, leaves no room for Title IX liability when the administrators who made the contractual commitment necessary to receive federal funds had no notice of the discrimination that is alleged.[6] *A fortiori*, damage rules based purely on the operation of legal doctrines

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[6]Even if the Court extended the Spending Clause to encompass claims based on "constructive notice," *see* Brief for Petitioners ("Pet. Br.") at 36-38, the result in this case would be no different, since the trial court expressly found that the evidence is "not sufficient to establish a genuine issue of material fact as to [Respondent's] actual *or constructive* notice of [the teacher's] sexually discriminatory conduct." Pet. App. at 9a (emphasis added). A remand to reconsider this determination would be inappropriate since review was not requested (and would not have been available) to consider the appropriateness of summary judgment or the existence of material factual disputes. *See* Petition for Writ of Certiorari at i (question presented); Sup. Ct. R. 10.

such as "vicarious liability," "actual or apparent authority," or similar rubrics -- applicable even when the program's administrators have not themselves engaged in any intentional *or* unintentional misconduct -- are inappropriate. Such doctrines are at odds with Title IX's limited purpose, presumed under *Pennhurst* and demonstrated by the legislative history, of requiring federal fund recipients to comply with circumscribed contractual commitments.

II. NOTHING PECULIAR TO TITLE IX OVERCOMES THE STRONG PRESUMPTION AGAINST SWEEPING SPENDING CLAUSE REMEDIES

Notwithstanding the caution counseled by this Court's Spending Clause precedent, the youth and vulnerability of Title IX harassment victims may create a temptation to fashion harsher remedies. *See* Pet. Br. at 19-24. Nothing would be accomplished, however, by a damage rule that penalizes school administrators who have acted responsibly when harassment cases have been brought to their attention, including many cases when the administrators had no opportunity to address or prevent unanticipated misconduct. A vicarious liability award against a school administration that reacted reasonably and responsibly to situations the knew about will not change future behavior; it will only divert education funds intended for the benefit of all students.

There is no justification, therefore, for a Title IX rule that would sweep more broadly than is necessary to deter inappropriate conduct. While Petitioners and supporting *amici* at times invoke distinctions between Title IX and Title VII that allegedly require a harsher Title IX rule -- even as they rely extensively on Title

VII case law -- none of these distinctions should sway the Court's analysis.

A. Differences Between The Texts Of Title IX And Title VII Are Not Controlling

As an initial matter, Title IX's operative text is phrased as a grant of freedom from discrimination given to individual "person[s]" instead of a prohibition against discrimination by specified parties. *See* Pet. Br. at 15-17; U.S. Br. at 21-22. Divorced from the balance of the statutory text, this language could mean "that all discrimination by anyone associated with the educational program, including students, violates the school district's duty and gives rise to liability under the statute." Pet. Br. at 18. This interpretation is rejected even by Petitioners. *Id.*

While some limitation obviously is required, *id.*, it need not be provided through a new judicially-created rule divorced from the statutory language. Title IX defines "education program" not to encompass "anyone associated with the educational program," *id.*, but rather to include only individuals involved in an institution's or district's "operations." 20 U.S.C. § 1687; *see Smith*, 128 F.3d at 1024 (definition restricted to administrative officials). Thus, if these individuals -- the program's administrative officers or board members -- have knowingly engaged in unlawful discrimination, then liability is appropriate. In the absence of such facts, however, the text of Title IX provides no basis for a damage award against the program in question.

B. Department of Education Guidelines Do Not Require a Different Result

Nor should this Court be driven to a result contrary to its own precedent, as well as Title IX's text, legislative history, and purpose, because of deference to recent guidelines issued by the Department of Education's Office of Civil Rights ("OCR"). While these guidelines seem to suggest a role for broader employer liability notions such as "apparent authority," they are ambiguous as to the scope of the proposed rule or how it would apply. *See* 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997). The new guidelines, moreover, represent a substantial shift in the OCR's position that does not merit controlling deference. *See Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 436 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Before the OCR issued its March 1997 guidelines -- after the events that led to this lawsuit as well as the trial court's ruling -- the only available expression of agency policy was a 1981 internal departmental memorandum. *See* U.S. Br., Lodging 2.[7] This memorandum is anything but clear, consisting mainly

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[7]A non-public document, drafted by agency counsel with no policymaking authority, is not a statement of official agency interpretation that is binding on educational institutions that had no access to it. *See, e.g., Smiley v. Citibank, N.A.*, 116 S. Ct. 1730, 1734 (1996) (opinion expressed in letter from Deputy Chief Counsel for the Comptroller of the Currency insufficient to establish "binding agency policy").

of a rambling discourse on individual cases. While the memorandum includes a few scattered references to agency principles in the context of student-on-student harassment, *see, e.g., id.* at 7, it concludes that several critical issues concerning the liability of educational institutions, including the effect of harassment prevention measures on *respondeat superior* liability, remain "unresolved." *Id.* at 8-10.

Moreover, even if assorted references in that document to EEOC guidelines and Title VII cases could somehow be construed as a wholesale adoption of "EEOC standards of employer liability," Pet. Br. at 39, the EEOC's own position has been anything but clear or consistent. As of 1981, the EEOC apparently interpreted Title VII, as it argued in *Meritor* five years later, to support employer liability for hostile environment harassment only if the employer knew or should have known about the situation but failed to respond reasonably. *See Meritor*, 477 U.S. at 71 (quoting Brief for the United States and EEOC as *Amici Curiae* ("EEOC Br., *Meritor*") at 26). The EEOC's interpretation changed, however, when the Commission issued revised policy guidance in 1990. EEOC Policy Guidance on Sexual Harassment (Mar. 19, 1990), *reprinted in* Fair Empl. Practices Manual (BNA) 405:6681.[8]

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[8]The EEOC's 1990 Policy Guidance began with the principle that employers should be subject to "direct liability" if they "knew or had reason to know of the sexual misconduct" of a supervisor, *Id.* at 405:6695 (citing EEOC Br., *Meritor* at 25). The Guidance adds, however, that "imputed liability" might also be found because harassment was within a supervisor's "scope of employment" or "apparent authority, or under "other similar theories." *Id.* at 405:6696-

[Footnote continued on next page]

If the OCR's vague 1981 internal memorandum is somehow read as documenting the agency's intention to interpret Title IX in lockstep with the EEOC, including all future changes in the Commission's position, then OCR policy has been no more consistent than the EEOC's shifting articulations. If, on the other hand, the early statement is interpreted as adopting the EEOC's position as of 1981, then OCR policy would not have supported liability in this case until 1997, when the agency suddenly changed course.

In either event, neither the OCR guidelines nor the EEOC interpretations they reference offer a coherent or consistent position, and this Court should not depend upon them for conclusive authority. Instead, the Court should rely on Title IX's text, legislative history, and underlying purpose to hold that education programs cannot be liable for sexual harassment claims when their administrators knew nothing about the misconduct that is alleged.

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99. These latter declarations directly contradict the Commission's brief in *Meritor*. *See* EEOC Br., *Meritor* at 24 ("By definition," a supervisor is "not exercising . . . actual or apparent authority" or "further[ing] any business of his employer as principal" in a hostile environment case).

CONCLUSION

For all of the foregoing reasons, the Court should affirm the decision of the court below.

February 13, 1998

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